



# TRADING WITH INTEGRITY

**Eliminating Bribery from International Business**



**Transnational Crime Section**

**Department of Foreign Affairs and Trade**



Australian Government  
Department of Foreign Affairs and Trade

[www.dfat.gov.au](http://www.dfat.gov.au)

Foreign Affairs and Trade



# Outline

- Consequences of foreign bribery
- Elements of the foreign bribery offence
- Facilitation payments v bribes
- Risk management and effective compliance systems
- DFAT's role



# Consequences of bribery

**Bad for business**

**Bad for the brand**

**Bad for the country which is accepting the bribe**

**Bad for Australia**



Foreign Affairs and Trade

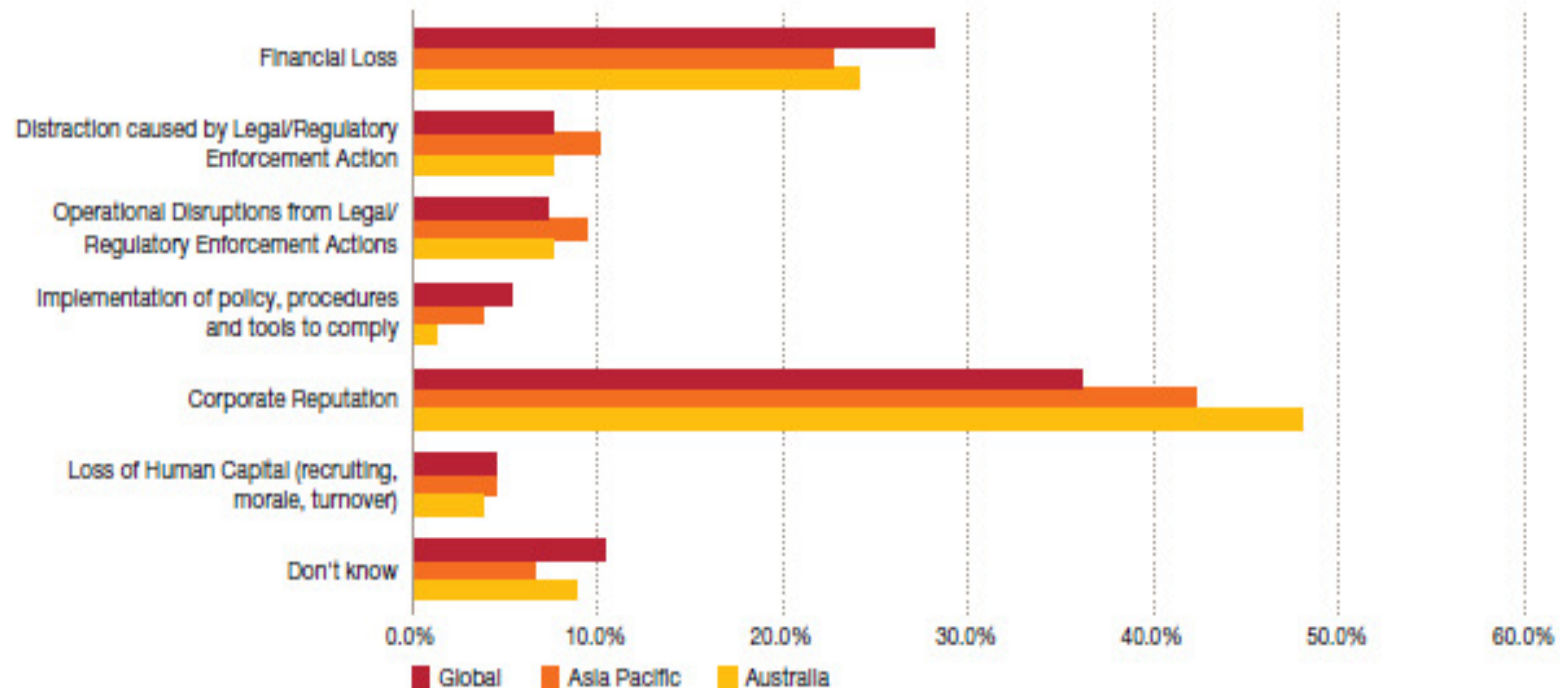


Australian Government  
Department of Foreign Affairs and Trade

[www.dfat.gov.au](http://www.dfat.gov.au)



With respect to corruption/bribery what do you perceive to be the most severe impact to your organisation?



Source: PricewaterhouseCoopers, 2014 Global Economic Crime Survey:  
The Australian Story

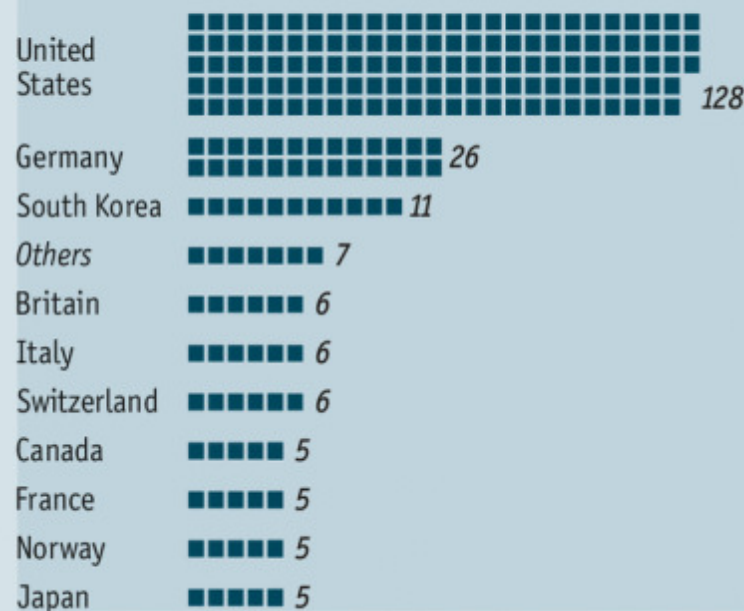




## Bad bargains

Foreign bribery, 1999-2014

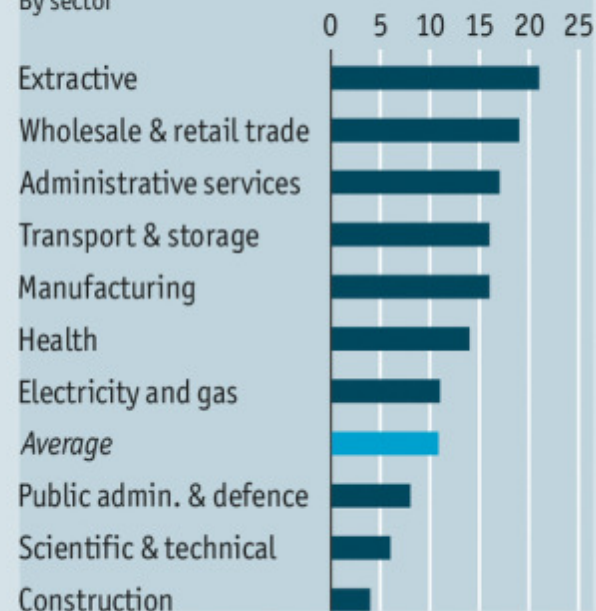
Enforcement actions resulting in sanctions



Source: OECD

Average bribe as % of total transaction value

By sector



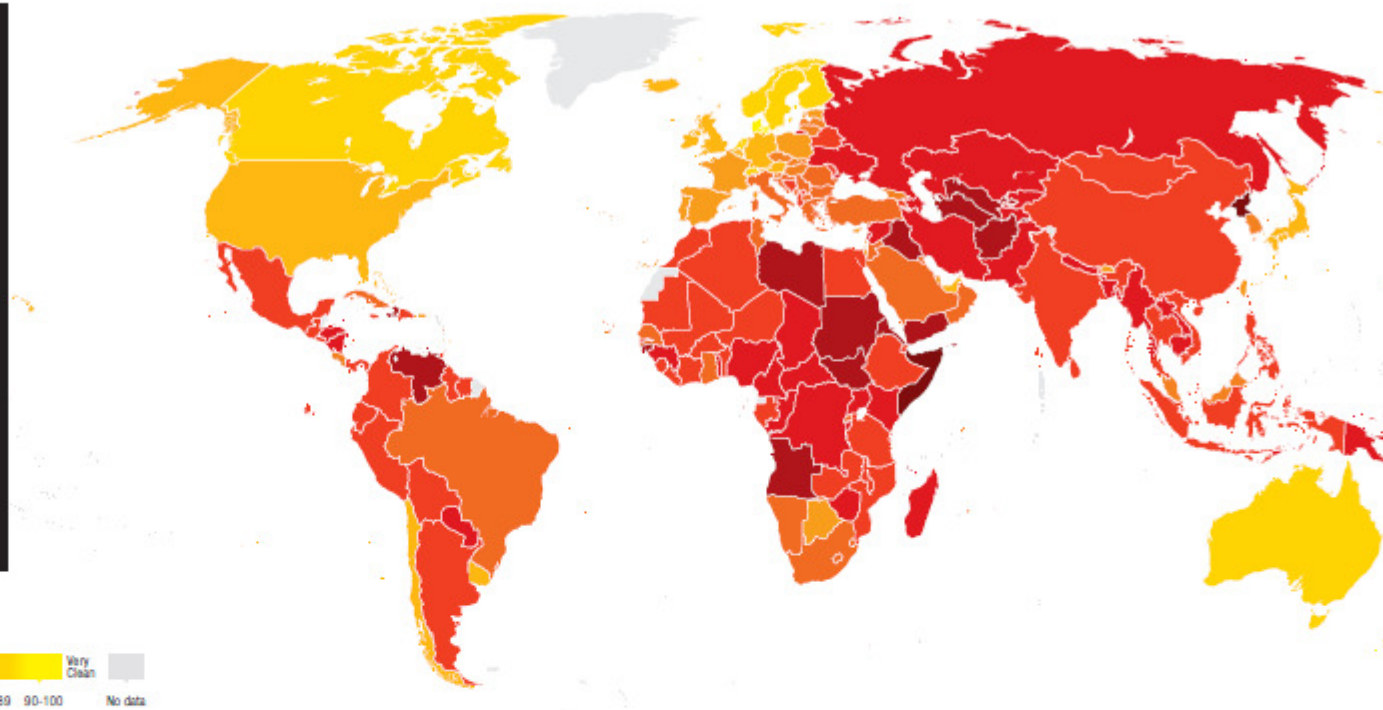
Source: The Economist, 6 December 2014





# CORRUPTION PERCEPTIONS INDEX 2014

The perceived levels of public sector corruption in 175 countries/territories around the world.



RANK	COUNTRY/TERRITORY	SCORE	21	Chile	73	RANK	COUNTRY/TERRITORY	SCORE	61	Croatia	48	RANK	COUNTRY/TERRITORY	SCORE	100	Algeria	36	RANK	COUNTRY/TERRITORY	SCORE	136	Nigeria	27	RANK	COUNTRY/TERRITORY	SCORE
1	Denmark	92	21	Uruguay	73	39	Slovenia	58	61	Ghana	48	80	Bosnia and Herzegovina	39	100	China	36	119	Mozambique	31	136	Russia	27	156	Zimbabwe	27
2	New Zealand	91	23	Austria	72	42	Cape Verde	57	63	Cuba	46	80	El Salvador	39	100	Suriname	36	119	Sierra Leone	31	142	Comoros	26	159	Burundi	26
3	Finland	89	24	Bahamas	71	43	Korea (South)	55	64	Oman	45	80	Mongolia	39	103	Bolivia	35	119	Tanzania	31	142	Uganda	26	159	Syria	26
4	Sweden	87	25	United Arab Emirates	70	43	Latvia	55	64	The FYR of Macedonia	45	80	Morocco	39	103	Mexico	35	119	Vietnam	31	142	Ukraine	26	161	Angola	26
5	Norway	86	26	Estonia	69	43	Malta	55	64	Turkey	45	85	Burkina Faso	38	103	Moldova	35	124	Guyana	30	145	Bangladesh	25	161	Guinea-Bissau	25
6	Switzerland	86	26	France	69	43	Seychelles	55	64	Kuwait	44	85	India	38	103	Niger	35	124	Mauritania	30	145	Guinea	25	161	Haiti	25
7	Singapore	84	26	Qatar	69	47	Costa Rica	54	67	South Africa	44	85	Jamaica	38	107	Argentina	34	126	Azerbaijan	29	145	Kenya	25	161	Venezuela	25
8	Netherlands	83	26	Qatar	69	47	Hungary	54	67	South Africa	44	85	Peru	38	107	Djibouti	34	126	Gambia	29	145	Laos	25	161	Yemen	25
9	Luxembourg	82	29	Saint Vincent and the Grenadines	67	47	Mauritius	54	69	Brazil	43	85	Philippines	38	107	Indonesia	34	126	Honduras	29	145	Papua New Guinea	25	166	Eritrea	25
10	Canada	81	30	Bhutan	65	50	Georgia	52	69	Bulgaria	43	85	Sri Lanka	38	110	Albania	33	126	Kazakhstan	29	160	Central African Republic	24	166	Libya	24
11	Australia	80	31	Botswana	63	50	Malaysia	52	69	Greece	43	85	Thailand	38	110	Ecuador	33	126	Nepal	29	160	Uzbekistan	24	166	Kirgizstan	24
12	Germany	79	31	Cyprus	63	50	Samoa	52	69	Italy	43	85	Trinidad and Tobago	38	110	Ethiopia	33	126	Pakistan	29	150	Paraguay	24	169	Turkmenistan	24
12	Iceland	79	31	Portugal	63	53	Czech Republic	51	69	Romania	43	85	Zambia	38	110	Kosovo	33	126	Togo	29	152	Congo Republic	23	170	Iraq	23
14	United Kingdom	78	31	Puerto Rico	63	54	Slovakia	50	69	Senegal	43	85	Armenia	37	110	Malawi	33	133	Madagascar	28	152	Tajikistan	23	171	South Sudan	23
15	Belgium	76	35	Poland	61	56	Bahrain	49	69	Swaziland	43	84	Colombia	37	115	Côte d'Ivoire	32	133	Nicaragua	28	154	Chad	22	172	Afghanistan	22
15	Japan	76	35	Taiwan	61	56	Jordan	49	76	Montenegro	42	84	Egypt	37	115	Dominican Republic	32	133	Timor-Leste	28	154	Democratic Republic of the Congo	22	173	Sudan	22
17	Barbados	74	37	Israel	60	56	Lesotho	49	76	Sao Tome and Principe	42	84	Gabon	37	115	Guatemala	32	136	Cameroon	27	156	Kirgizstan	21	174	Korea (North)	21
17	Hong Kong	74	37	Spain	60	56	Namibia	49	78	Serbia	41	84	Liberia	37	115	Mali	32	136	Iran	27	156	Cambodia	21	174	Somalia	21
17	Ireland	74	39	Dominica	58	56	Rwanda	49	79	Tunisia	40	84	Panama	37	119	Belarus	31	136	Kyrgyzstan	27	156	Myanmar	21			
17	United States	74	39	Lithuania	58	56	Saudi Arabia	49	80	Benin	39	84						136	Lebanon	27						



# Foreign bribery offence in Australia

**Introduced in the *Criminal Code* (Cth) in December 1999**

**First charges not laid until July 2011**

- two companies (Securrency and Note Printing Australia)
- eleven individuals (former executives and sales agents of those companies)

**These are to date the only foreign bribery prosecutions, and they are still ongoing**

- one individual pleaded guilty (sentence: six months imprisonment)
- charges against one individual dismissed at Committal in 2012
- charges against another individual withdrawn in 2013





## ***Criminal Code (Cth), s 70.2***

A person is guilty of an offence if:

- the person provides, offers or promises to provide a benefit to someone that is not legitimately due; and
- the person does so with the intention of influencing a foreign public official in the exercise of the official's duties;
- in order to obtain or retain business, or a business advantage, that is not legitimately due.

A benefit can be a non-monetary or non-tangible inducement – it is not limited to money or property.

The person receiving the bribe does not have to be the foreign public official him or herself.

The person paying the bribe does not have to be the person who obtains or retains the business or business advantage.







# Penalties

## Individuals

- maximum of 10 years imprisonment and/or fine of A\$1.7 million  
*Criminal Code (Cth) s 70.2(4)*

## Bodies Corporate

- maximum fine, the greater of:
  - A\$17 million; or
  - 3 times the value of the benefit (if calculable); or
  - 10 per cent of annual turnover for previous 12 months

*Criminal Code (Cth) s 70.2(5)*

Any profits obtained through foreign bribery could also be seized as proceeds of crime.





# What is a bribe?

## **Bribery takes many forms:**

- disguised agents fees
- payments made via third countries
- lavish expenses paid, such as travel, education and gifts
- political donations
- inflated or dummy tenders
- payments with no records made or no monitoring of agent activities





# Who is a foreign public official?

## *Criminal Code (Cth), s 70.1*

A foreign public official includes:

- an employee, official or contractor of a foreign government body (including a member of a military force or police force) or a public international organisation;
- an office holder under a law, custom or convention in a foreign country, or in a public international organisation;
- a member of the executive, judiciary, magistracy or legislature in a foreign country; or
- an individual who is or purports to be an authorised intermediary of any of the above.

Persons related to the Head of State/Head of Government/Minister?





# Defences

## 1. Conduct is lawful in the foreign public official's country

There must be a written law in force in that place to benefit from this defence — cannot be an unwritten or customary law/convention.

*Criminal Code (Cth) s 70.3*

## 2. Facilitation payments

Facilitation payments are payments that are not considered to be bribes, and are therefore lawful.

*Criminal Code (Cth) s 70.4*







# What are facilitation payments?

***Criminal Code (Cth)*, s 70.4 — for the defence to be made out:**

- the value of the payment must be minor;
- the payment must be made for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature; and
- as soon as practicable after the conduct occurred, the payer must make and keep a signed record of the payment setting out its value, date, the identity of the foreign public official and any other person directly involved in the payment, and particulars of the relevant routine government action.





# What is routine government action?

- Action that is ordinarily and commonly performed by the official.
- Covers the granting of permits, licences or other documents which qualifies a person to conduct business in the foreign country.
- Also covers visas and work permits; mail collection and delivery; police protection; inspection associated with contract performance or transit of goods; and the loading and unloading of cargo.

Does **not** involve a decision about, or encouraging a decision about, whether to award new business, or to continue existing business, or the terms of a new business.



# What is the difference?



**The line between facilitation payments and bribes is often blurry**

- no judicial guidance

**The Australian Government strongly discourages Australian businesses and individuals from paying facilitation payments**

- we encourage all companies to prohibit the payment of facilitation payments

**The government is currently reviewing the facilitation payment defence**





# Facilitation payments: our advice

- Facilitation payments should be seen as a **business risk**, not a nuisance
  - and certainly not part of the costs of doing business in a country
    - likely to be illegal in the country in which they are paid
    - risk of prosecution in the local jurisdiction
    - risk of prosecution in Australia
    - risk of prosecution in other jurisdictions (e.g. US and UK)
    - risk of loss of civil remedies relating to the relevant transactions







# Managing the risk

**What should you do if approached by a foreign public official for a bribe?**

- Don't pay
- Get legal advice
- Report the official to the official's superior officer / local police
- Report the approach to the nearest Australian mission or DFAT HQ
- Keep records

Foreign Affairs and Trade



Australian Government  
Department of Foreign Affairs and Trade

[www.dfat.gov.au](http://www.dfat.gov.au)



# Managing the risk

**What should you do if your competitor is paying bribes?**

- Don't pay
- Report them
  - to local authorities (in all cases)
  - to the Australian Federal Police (if the competitor is Australian)
  - to the nearest Australian mission or DFAT HQ (regardless of whether the competitor is Australian or from a third country)



# Compliance systems and corporate culture



## **Effective internal compliance systems**

- the state of an organisation's compliance systems is broadly reflective of their legal risk and exposure
- good systems can provide the basis for a practical defence
- they can also protect against penalties or civil actions by shareholders

**The best compliance systems are holistic, aimed at preventing, detecting and responding to bribery and corruption**



# Compliance systems and corporate culture



**An effective compliance system is intertwined with corporate culture**

## ***Criminal Code (Cth), s 12.3:***

- If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
- ‘Corporate culture’ means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.





# Compliance systems and corporate culture



- Maintaining sound internal controls, ethics and compliance measures to prevent and detect foreign bribery should include:
  - strong commitment from management for anti-bribery policies;
  - policies which prohibit bribery, instil good account and record-keeping practices, and manage the conduct of receiving gifts, hospitality, and donations;
  - training on a regular basis; and
  - oversight and reporting mechanisms (including self-reporting mechanisms).
- *United States v Peterson* and *SEC v Peterson*





# Due diligence

- Undertake due diligence on new business partners, agents, and tender processes.
- Transaction monitoring and auditing.
- Documented and well-known ‘warning signals’.

Foreign Affairs and Trade



Australian Government  
Department of Foreign Affairs and Trade

[www.dfat.gov.au](http://www.dfat.gov.au)



## How we can help

We can:

- assist you avoid paying bribes and facilitation payments by raising the issue with senior officials in the relevant country;
- call for investigation / prosecution against corrupt competitors in their home jurisdictions; and
- pursue international initiatives to strengthen anti-corruption efforts in key Australian markets.

For us to be able to assist, we need you to:

- report corrupt approaches; and
- report corrupt actions of others.





# International Initiatives

## OECD

- *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (1997)
- Working Group on Bribery in International Business Transactions

## United Nations

- *United Nations Convention against Corruption* (2003)
- Conference of Parties and Implementation Review Mechanism

## APEC

- Anti-Corruption and Transparency Experts Working Group

## G20

- Anti-Corruption Working Group / G20 Anti-Corruption Action Plan

## Financial Action Task Force







## Further information

### **DFAT: Measures against corruption**

<http://dfat.gov.au/issues/measures-against-corruption.html>

### **AGD: Crime and corruption**

<http://www.ag.gov.au/CrimeAndCorruption/AntiCorruption/Pages/default.aspx>

### **Online learning module for foreign bribery:**

<http://www.ag.gov.au/CrimeAndCorruption/Foreignbribery/OnlineModule/index.html>

**Email us at** [transnational.crime@dfat.gov.au](mailto:transnational.crime@dfat.gov.au)

